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Datuk Seri Anwar bin Ibrahim v Kerajaan Malaysia (Muhammad Shafee Abdullah, intervener)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-413–11 OF 2017
VERNON ONG, HASNAH HASHIM AND MARY LIM JJCA
13 OCTOBER 2020

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Civil Procedure — Interlocutory proceedings — Application for leave to intervene — Appellant filed originating summons seeking declaration that his conviction under s 377 of the Penal Code was null, void and of no effect — High Court allowed respondent's application to strike out originating summons — Appellant appealed against High Court's decision — Intervener applied for leave to intervene in appellant's appeal — Whether intervener's rights and interests directly affected — Whether there was merit in intervener's application

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Vide an originating summons ('the originating summons'), the appellant sought to declare that his conviction under s 377B of the Penal Code by the Court of Appeal and the affirmation thereof by the Federal Court were null and void and of no effect. The appellant's application was premised on the ground that his right to a fair trial under art 5(1) of the Federal Constitution had been allegedly violated because the intervener who had been appointed as a deputy public prosecutor (ad hoc) to conduct those appeals was not an independent prosecutor. The appellant submitted that the intervener had a financial interest in the appointment as he had received payment of RM9.5m from the then Prime Minister for such appointment. Following the originating summons, the parties had made several applications as followed: (a) appellant's application for discovery against the intervener ('encl 5'); (b) the respondent's application to strike out the originating summons ('encl 7'); (c) the appellant's application to strike out certain words used in the supporting affidavit to encl 7 ('encl 17'); and (d) the intervener's application ('encl 16') and the then Prime Minister's application ('encl 10') to strike out the originating summons and encl 5. The High Court allowed encl 7 and consequently struck out encls 1, 5, 10 and 16. Aggrieved by the said decision, the appellant filed an appeal. In the present appeal, vide encl 27, the intervener filed an application for leave to intervene ('prayer 1') and to expunge Siti Rahayu's affidavit from the records of the court ('prayer 2') and to cross-examine her on the same ('prayer 3').

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Held, allowing prayer 1 of encl 27 and dismissing prayers 2 and 3 of encl 27:

(1) The court was satisfied that not only were the intervener's rights and interests directly affected, his presence would be necessary to ensure that

all matters in dispute in this appeal be effectually and completely determined and adjudicated upon. At this stage, there was every indication that Siti Rahayu's affidavit was intended to be used in this appeal by the appellant to support his position that his appeal was of merit. Almost everything in the contents of Siti Rahayu's affidavit related and concerned the intervener and his ad hoc appointment (see paras 17–18).

(2) The subject matter of the originating summons and the related applications all stemmed from and related to the appellant's allegations of lack of a fair trial and violation of his rights under the Federal Constitution for the very reason that the intervener was not an independent prosecutor, and upon which the appellant sought declaratory orders nullifying his convictions by the Court of Appeal and the Federal Court. These were strong, valid and cogent reasons for the court to allow the intervener's application (see para 19).

(3) By virtue of the appellant's own application for discovery against the intervener (encl 5) and the intervener's application to strike out the same (encl 16), the intervener was already an interested party on no less than those two occasions. It was also clear that intervener's legal interests would be affected by a judgment in the originating summons as the gist of the appellant's complaints was the payment of the RM9.5m to the intervener for the prosecution against him; that the intervener had financial interest in that prosecution (see para 21).

(4) The intervener's application to expunge Siti Rahayu's affidavit from the records of the court in this appeal and to cross-examine her on the same were without merit (see para 22).

[Bahasa Malaysia summary

Melalui saman pemula ('saman pemula tersebut'), perayu memohon pengisytiharan bahawa sabitannya di bawah s 377B Kanun Keseksaan oleh Mahkamah Rayuan dan pengesahannya oleh Mahkamah Persekutuan adalah terbatal dan tidak sah dan tidak berkuatkuasa. Permohonan perayu berdasarkan pada alasan bahawa haknya untuk perbicaraan yang adil di bawah perkara 5(1) Perlembagaan Persekutuan didakwa telah dilanggar kerana pencelah yang telah dilantik sebagai timbalan pendakwa raya (ad hoc) untuk menjalankan rayuan tersebut bukanlah pendakwa raya bebas. Perayu berhujah bahawa pencelah mempunyai kepentingan kewangan dalam lantikan tersebut kerana dia telah menerima pembayaran sebanyak RM9.5 juta daripada Perdana Menteri pada ketika itu untuk lantikan tersebut. Lanjutan daripada pemfailan saman pemula tersebut, pihak-pihak telah membuat beberapa permohonan seperti berikut: (a) permohonan perayu untuk penzahiran terhadap pencelah ('lampiran 5'); (b) permohonan responden untuk membatalkan saman pemula ('lampiran 7'); (c) permohonan perayu untuk

membatalkan perkataan tertentu yang digunakan dalam afidavit sokongan untuk lampiran 7 ('lampiran 17'); dan (d) permohonan pencelah ('lampiran 16') dan permohonan Perdana Menteri ketika itu ('lampiran 10') untuk membatalkan saman pemula tersebut dan lampiran 5. Mahkamah Tinggi membenarkan lampiran 7 dan sekaligus membatalkan lampiran 1, 5, 10 dan 16. Terkilan dengan keputusan tersebut, perayu memfailkan rayuan. Dalam rayuan ini, melalui lampiran 27, pencelah memfailkan permohonan bagi kebenaran untuk mencelah ('permohonan 1') dan untuk mengeluarkan afidavit Siti Rahayu dari rekod mahkamah ('permohonan 2') dan untuk memeriksa balas Siti Rahayu berkenaan afidavit tersebut ('permohonan 3').

Diputuskan, membenarkan permohonan 1 bagi lampiran 27 dan menolak permohonan 2 dan 3 bagi lampiran 27:

(1) Mahkamah berpuas hati bahawa bukan hanya hak dan kepentingan pencelah terlibat secara langsung, tetapi kehadiran pencelah juga diperlukan untuk memastikan bahawa semua perkara yang dipertikaikan dalam rayuan ini dapat ditentukan dan diputuskan secara efektif dan sepenuhnya. Pada tahap ini, terdapat tanda-tanda bahawa afidavit Siti Rahayu dimaksudkan untuk digunakan dalam rayuan ini oleh perayu untuk menyokong pendiriannya bahawa rayuannya bermerit. Hampir semua perkara di dalam afidavit Siti Rahayu berkaitan dan bersangkut paut dengan pencelah dan pelantikan ad hocnya (lihat perenggan 17–18).

(2) Perkara pokok dalam saman pemula dan permohonan yang berkaitan semuanya berpunca dari dan berkaitan dengan dakwaan perayu berkenaan ketiadaan perbicaraan yang adil dan pelanggaran hak-haknya di bawah Perlembagaan Persekutuan dengan alasan bahawa pencelah bukanlah pendakwa raya bebas, dan di mana perayu meminta perintah deklarasi untuk membatalkan sabitannya oleh Mahkamah Rayuan dan Mahkamah Persekutuan. Ini adalah alasan yang kuat, sah dan meyakinkan bagi mahkamah untuk membenarkan permohonan pencelah (lihat perenggan 19).

(3) Berdasarkan permohonan perayu sendiri untuk penzahiran terhadap pencelah (lampiran 5) dan permohonan pencelah untuk membatalkan permohonan penzahiran (lampiran 16), pencelah telah menjadi pihak yang berkepentingan hanya berdasarkan dua keadaan tersebut. Juga jelas bahawa kepentingan undang-undang pencelah akan dipengaruhi oleh keputusan dalam saman pemula tersebut kerana intipati aduan perayu adalah pembayaran RM9.5 juta kepada pihak pencelah untuk pendakwaan terhadapnya; bahawa pencelah mempunyai kepentingan kewangan dalam pendakwaan tersebut (lihat peranggan 21).

(4) Permohonan pencelah untuk mengeluarkan afidavit Siti Rahayu dari rekod mahkamah dalam rayuan ini dan untuk memeriksa balasnya

A berkenaan perkara yang sama adalah tidak bermerit (lihat perenggan 22).]

Cases referred to

B *Chong Fook Sin v Amanah Raya Bhd (as the administrator for the estate of Raja Nong Chik bin Raja Ishak, deceased) & Ors* [2011] 1 MLJ 721, FC (refd)
Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622, FC (refd)
Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (refd)
C *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63, SC (refd)

Legislation referred to

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2011 ss 4(1)(a), 44(1)
D Federal Constitution arts 5(1), 145
Penal Code s 377B
Rules of Court 2012 O 15 r 6(2)

Appeal from: Originating Summons No WA-24–36–06 of 2017 E (High Court, Kuala Lumpur)

Gopal Sri Ram (Leela Jesuthasan, Emily Wong and How Li Nee with him) (Chambers of Leela J) for the appellant.
Amarjeet Singh a/l Serjit Singh (Alice Loke Yee Ching and Suzana Atan with him) for the respondent.
F *Harvinderjit Singh (Sarah Abishegam and Wee Yeong Kang with him) (Shafee & Co) for the intervener.*

Mary Lim JCA (delivering judgment of the court):

G **[1]** Enclosure 27 is an application by the proposed intervenor for leave to intervene in the main appeal at the Court of Appeal. On 29 November 2018, we unanimously allowed the application after hearing the parties.

H **[2]** In encl 27, the proposed intervenor sought these main prayers:

(a) that the proposed intervener, Muhamad Shafee Abdullah, be hereby given leave to intervene in Civil Appeal No W-01(A)-413–11 of 2017 and be heard accordingly;

I (b) that the affidavit affirmed by Siti Rahayu bt Mohd Mumazaini on 5 September 2018 (the said affidavit) and filed in the present appeal be expunged from the records of this honourable court; and

(c) further and/or in the alternative that the said Siti Rahayu bt Mohd Mumazaini (NRIC No 840418–01–6440) attend before this

honourable court on a date to be fixed to be cross examined by counsel acting for the proposed intervener on the contents of the said affidavit and other issues identified by the proposed intervener and/or as deemed fit and proper by this honourable court.

[3] This is the relevant factual background as gathered from the affidavits and counter affidavits filed. These facts were critical to our evaluation and determination of the application for intervention. We will refer to the parties as they were at the High Court, and the proposed intervener, by the initials of his name, 'MSA'.

[4] Vide originating summons filed at the High Court (OS) where the Government of Malaysia is cited as the defendant, the plaintiff sought to declare that his conviction of an offence under s 377B of the Penal Code by the Court of Appeal on 7 March 2014 and the subsequent affirmation of the said decision by the Federal Court on 10 February 2015 is null and void and of no effect. The plaintiff's principal ground for the order was that his right to a fair trial under art 5(1) of the Federal Constitution had been allegedly violated because MSA who had been appointed as a deputy public prosecutor (ad hoc) to conduct those relevant appeals was not an independent prosecutor. MSA is said to have had a financial interest in the appointment as he had received payment of RM9.5m from the then Prime Minister for such appointment. The plaintiff relied on a Sarawak Report dated 31 May 2017 which he claimed had 'now surfaced and is in the public domain'; that because of the payment, MSA had a 'substantial financial interest in the outcome of the case'.

[5] Following this, the plaintiff filed an application for discovery against MSA (encl 5), seeking production of MSA's banking documents, namely 'any and all my statements of account from whatsoever bank at which I maintain an account or accounts for the period of August 2013 to October 2013 and for the period January 2014 to March 2014 and in particular the entries that show the receipt of the sum of RM4.3m and RM5.2m from Dato' Seri Najib bin Tun Abdul Razak'. The discovery was also against the then Prime Minister.

[6] Meanwhile, the defendant, the Government of Malaysia, filed an application (encl 7) seeking to strike out the plaintiff's originating summons. Amongst the grounds relied on were:

(a) that the court did not have the necessary jurisdiction to grant the reliefs sought;

(b) there was no valid cause of action against the respondent;

(c) the plaintiff's convictions were adjudicated on finally at the Court of Appeal and Federal Court aside from his two unsuccessful applications for review of the Federal Court's decisions, and the principle of res judicata applied;

(d) plaintiff had commenced similar proceedings vide Kuala Lumpur High Court Civil Suit No WA-21NCVC-45–04 of 2017; and

(e) the matter was non-justiciable by virtue of art 145 of the Federal Constitution.

[7] The plaintiff in response filed encl 17 to strike out certain words used in the supporting affidavit to encl 7.

[8] On 3 August 2017, MSA applied vide encl 16 to strike out both the discovery application and the originating summons, that is, encls 5 and 1 respectively. The then Prime Minister filed a similar application — encl 10.

[9] On 5 October 2017, the High Court heard arguments from the appellant and the respondent on encl 7. On that same date, encls 1, 5 and 16 were all fixed for case management. On 5 November 2017, the respondent's application was allowed with costs. This meant the plaintiff's originating summons was struck out. As a consequential order, the High Court struck out encls 1, 5, 10 and 16 with no order as to costs.

[10] The plaintiff appealed.

[11] On 6 September 2018, an affidavit affirmed on 5 September 2018 by one Siti Rahayu bt Mohd Mumazaini was filed in this appeal proceedings (Siti Rahayu's affidavit), on the instructions of the then attorney general and public prosecutor. That affidavit served to:

(a) exhibit specific documents such as cheque images, bank statements and extracts of bank statements which are said to show the payment of RM9.5m in two tranches to MSA;

(b) aver that this information and the documents were only obtained by the respondent and the public prosecutor's office on 29 June 2018 pursuant to investigations against MSA under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2011 ('the AMLATFPUAA');

(c) aver that the respondent did not have this information at the time of hearing of encl 7 at the High Court on 5 October 2017;

(d) aver that this information was only obtained by the Malaysian Anti-Corruption Commission after a freezing order under s 44(1) of the

AMLATFPUAA was procured on 29 June 2018; and

(e) aver that para 28 of MSA's affidavit in support of his application to intervene in encl 27 was untruthful.

[12] On 7 September 2018, the plaintiff disclosed Siti Rahayu's affidavit to the press. The following day, MSA issued a press statement in response to that disclosure where he explained the circumstances of his appointment.

[13] According to paras 8–11 of his affidavit in support, MSA expressed his concerns that the filing of Siti Rahayu's affidavit as being 'unprecedented'; 'a political manoeuvre to further the interest of the appellant'; that 'it is not beyond contemplation that in furtherance of the appellant's own interests, the respondent will attempt to concede to the appeal'; that 'this is a clear abuse of the process of this honourable court'. In essence, MSA denied that he had any pecuniary or financial interest in the outcome of the plaintiff's appeals; that the impugned payments are unrelated to his appointment as DPP in the plaintiff's appeals.

[14] On 11 September 2018, MSA filed a police report on the contents of Siti Rahayu's affidavit and the disclosure of the same by the plaintiff.

[15] A day before the present appeal was heard, MSA was charged for inter alia an offence under s 4(1)(a) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 — see exh MSA8 in encl 37.

[16] The law on intervention in a pending matter, including appeal, is fairly trite. The Privy Council decision in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52 is still good law. It has been applied in a long line of cases including *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63; *Chong Fook Sin v Amanah Raya Bhd (as the administrator for the estate of Raja Nong Chik bin Raja Ishak, deceased) & Ors* [2011] 1 MLJ 721; and *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622.

[17] We were amply satisfied that given this factual backdrop, the application in encl 27 is of merit. We were satisfied that not only were MSA's rights and interests directly affected, his presence would be necessary to ensure that all matters in dispute in this appeal be effectually and completely determined and adjudicated upon. The matters averted to in Siti Rahayu's affidavit are undeniably matters that concern MSA and it is MSA's ad hoc appointment as deputy public prosecutor that lies at the heart of the plaintiff's allegation of want of a fair trial and a violation of his rights under the Federal Constitution.

[18] We cannot agree with the plaintiff's suggestion that MSA has no legal interest in the subject matter of the appeal. At this stage, there is every indication that Siti Rahayu's affidavit, which the plaintiff says contains 'material and relevant evidence', is intended to be used in this appeal by the plaintiff; to support his position that his appeal is of merit. Almost everything in the contents of Siti Rahayu's affidavit relate and concern MSA and his ad hoc appointment.

[19] The subject matter of the originating summons and the related applications all stem from and relate to the plaintiff's allegations of lack of a fair trial and violation of his rights under the Federal Constitution for the very reason that MSA was not an independent prosecutor, and upon which the plaintiff seeks declaratory orders nullifying his convictions by the Court of Appeal and the Federal Court. These are strong, valid and cogent reasons for us to allow MSA's application to intervene and we cannot be persuaded otherwise.

[20] We observed that the learned senior federal counsel had taken the position before us that MSA's application has met the conditions of O 15 r 6(2) of the Rules of Court 2012. Learned SFC explained that Siti Rahayu's affidavit was filed in the interest of justice. SFC's main concern really was on the prayers to expunge Siti Rahayu's affidavit and to cross-examine her on the contents of her affidavit.

[21] We must add that by virtue of the plaintiff's own application for discovery against MSA (encl 5) and MSA's application to strike out the same (encl 16), MSA was already an interested party on no less than those two occasions. It is also clear that MSA's legal interests will be affected by a judgment in the originating summons as the gist of the plaintiff's complaints is the payment of the RM9.5m to MSA for the prosecution against him; that MSA had financial interest in that prosecution.

[22] Accordingly, we are of the unanimous view that prayer (1) of the application in encl 27 should be granted, that MSA be and is hereby granted leave to intervene in this appeal. On the other hand, we are of the view that MSA's application to expunge Siti Rahayu's affidavit from the records of the court in this appeal and to cross-examine her on the same (prayers (2) and (3) in encl 27) is without merit.

[23] Finally, we made no order as to costs.

Prayer 1 of encl 27 allowed; prayers 2 and 3 of encl 27 dismissed.

Reported by Dzulqarnain Ab Fatar